



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 162 OF 2014

BETWEEN

LUCIA WANGARIPETITIONER

AND

UNCLAIMED FINANCIAL ASSETS AUTHORITYRESPONDENT

JUDGMENT

1. The petitioner in this matter is the administrator of the Estate of George Gitema Kabuchi (deceased), her husband. According to the submission by Mr Mariaria, her advocate, her husband was a policy holder of Kenya National Assurance Company (in liquidation) and her efforts to collect the deceased's benefits have been hampered by the fact that the Unclaimed Financial Assets Authority is yet to establish a Fund as it is a custodian of such assets under the ***Unclaimed Financial Assets Act, 2011***.
2. In the petition dated 8th April 2014, the petitioner seeks the following reliefs;
 1. *A declaration that the failure by the Respondent to commence its business and operations more than a year after the appointment of the Board of the Directors took effect on 25th October 2012 is a violation of the fundamental rights of the petitioner as provided in Article 47 of the Constitution.*
 2. *A declaration that the failure by the Respondent to establish the Unclaimed Assets Trust Fund and to publish the audited accounts of the Fund in the Kenya Gazette as required by Section 46 of the Unclaimed Financial Assets Act 2011 more than a year after the appointment of the Board of Directors took effect on 25th October 2012, is a violation of the fundamental rights of the petitioner as provided in Article 47 of the Constitution*
 3. *An order requiring the Board of Directors of the Respondent to forthwith commence the business and operations of the Unclaimed Financial Assets Authority by proceeding to competitively appoint a Chief Executive Officer, top management officers and other necessary and required support staff, in accordance with Section 42 of the Unclaimed Financial Assets Act and open its operational offices and in any case, not more than twenty one (21) days from the date of service of the order.*
 4. *An order requiring the Board of Directors of the Respondent to forthwith establish the Unclaimed*

- Assets Trust Fund and to publish the audited accounts of the Fund in the Kenya Gazette as required by Section 46 of the Unclaimed Financial Assets Act 2011, and in any case, not more than sixty (60) days from the date of service of the order.*
5. *An order requiring the Cabinet Secretary for the National Treasury to revoke the appointments of the current members of the Board Directors of the Respondent and to surcharge them for any allowances earned since their respective appointments should they fail to proceed to competitively appoint a Chief Executive Officer, top management officers and other necessary and required support staff, in accordance with Section 42 of the Unclaimed Financial Assets Act and open its operational offices and in any case, not more than twenty one (21) days from the date of service of the order.*
 6. *An order prohibiting persons, banks, companies and other financial institutions holding assets presumed abandoned and subject to the custody of the Unclaimed Financial Assets Authority from surrendering the said assets to the Respondent until the Unclaimed Assets Trust Fund is established in accordance with section 44 of the Unclaimed Financial Assets Act, 2011.*
 7. *Leave be and is hereby granted to the Petitioner to advertise this Honourable Court's order in at least two newspapers of national circulation.*
 8. *Costs of this Petition be granted to the Petitioner.*
 9. *Any other order that the court may deem fit to grant.*
3. When this matter came up for directions on 14th April 2014, both counsel for the petitioner and respondent requested the court to record a consent allowing the petition as prayed but in view of the prayers in petition, I was not satisfied that the prayers were warranted. In order to exercise the Court's discretion under **rule 29 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013**, whether or not I should record the settlement, I directed that the Chairman and Chief Executive of the respondent to swear replying affidavits. Vincent Kimutai Kimosop and George Omino, the Chairman and acting Chief Executive respectively, swore similar affidavits in which they, inter alia, stated as follows;

[8] *THAT the Respondent will suffer no prejudice if the petition will be allowed in terms of prayers 3,4,7 and 8 of petition dated 8th April, 2014, save that prayer 3 be allowed subject to the Respondent/Authority needs 45 (forty five) days to comply.*

[9] *THAT in Response to prayer 4 of the petition, the authority avers that it is in the process of establishing the fund and it will be in place on or before 30th June, 2014, and that it will need at least 90 days thereafter, to audit accounts thereto and subsequently publish them in the Kenya Gazette.*

[10] *THAT the Respondent however, objects to the grant of prayers No. 1, 2, 5, and 6 of the petition on the grounds that;*

- a. *The Respondent does not agree that it has failed to start its business for a period of over one year because it has merely not appointed a chief executive Officer.*
- b. *The Respondent has an operational Board of Directors, despite the fact that they have not appointed a chief executive officer to date.*
- c. *Though the Respondent has not established an Unclaimed Assets Trust Fund, the Respondent avers that it is in the process of establishing the fund and it will be in place on or before 30th June, 2014.*
- d. *THAT the authority vehemently opposes the grant of prayer 5, as the cabinet secretary of the National Treasury is not a party in these proceedings, and therefore granting or entertaining such an order, without according him an opportunity to be heard, will amount to breach of the laws of Natural Justice.*
- e. *THAT in response to prayer 6 of the petition the Respondent objects to its grant as granting such an order will be difficult to enforce.*
- f. *?THAT in response to prayer 9 of the petition, the Respondent leaves it to the discretion of the Court.*
- g. *THAT what is deponed to hereinabove is true to the best of my knowledge, information and belief.*

4. I have considered the issue in this matter and in my view the prayers will not assist the petitioner's grievances. This purpose of the court is to resolve real disputes. The petitioner has not, in her petition or deposition, demonstrated that her husband is a policy holder of Kenya National Assurance Company (In liquidation) and that as administrator she wrote to the liquidator making inquiries about the deceased's benefit. That the liquidator failed and/or refused to deal with the claim in any manner or referred her to the respondent. Likewise she has not shown any evidence that she wrote to the respondent who failed, refused or neglected to deal with the claim in any manner.
5. The prayers set out in the petition are far reaching and out of the proportion to the petitioner's grievance as explained by Mr Mariaria. They implicate the workings of a statutory body and in my view no violation of the statute and Constitution has been established. On the contrary the respondent has shown that it is working towards implementation of its statutory framework. It is therefore unnecessary for the Court to intervene in the manner suggested by the petitioner.
6. I decline the entreaty to allow the petition in terms of the propose settlement admitted in the replying affidavit for the aforesaid reasons. Furthermore, the Cabinet Secretary of the National Treasury, who is a material party to these proceedings has not been joined.
7. I am aware that dismissing a suit is drastic but the reliefs sought by the petitioner are not efficacious. The claim is unsupported by any evidence of violation of the Constitution. I am satisfied that the petitioner will not suffer any prejudice at this stage.
8. The petition can only be dismissed and it is hereby dismissed. There shall be no order as to costs.

DATED and DELIVERED at NAIROBI this 16th day of May 2014.

D.S. MAJANJA

JUDGE

Mr Mariaria instructed by Mariaria and Company Advocates for the petitioner.

Mr Ondieki instructed by Mokono Ondieki and Company Advocates for the respondent.